cised over the person rendering the service by the person to whom they were rendered. The greater the amount of such direct control, the more clear it is that the contract is one of service; the lesser the control, the more clear that it is a contract for service.

I would therefore dismiss this appeal with costs.

*Appeal dismissed.*

Solicitors: *Skrine & Co.; K. K. Lam & Co.*

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## CHIN SEE LIAN v. NG WAN PIT

**[O.C.J. (Mohamed Azmi J.) October 14, 1972]**

**[Kuala Lumpur — Civil Suit No. 1470 of 1970]**

*Landlord and Tenant — Whether relationship between parties that of landlord and tenant or licensor and licensee — Intention of parties — Whether agreement a sham to circumvent Control of Rent Ordinance, 1956 — Whether plaintiff estopped from alleging agreement was a sham — Evidence Ordinance, 1950, s. 115.*

The defendant was in occupation of the ground floor of certain premises under a written agreement, under which it was agreed that the defendant should carry on a coffee shop business for a period of 60 months, at the expiration of which the defendant undertook to give up vacant possession of the premises. Subsequently the premises were sold by the original owner and the plaintiff eventually become the owner. Thereafter the defendant paid the amounts payable under the agreement to the plaintiff. At the expiry of the 60 months period the plaintiff requested the defendant to give up the premises but the defendant refused to comply with his request, claiming that he was the tenant of the premises and was protected under the Control of Rent Ordinance, 1956.

**Held:** (1) in this case the circumstances and conduct of the parties showed that all that was intended was that the defendant should have a personal privilege as a licensee or agent under the contract to run the coffee shop at the premises for a period of 60 months with no interest in the land at all. At the expiry of that period, the plaintiff was entitled to have the premises back;

(2) the defendant in this case was estopped from alleging that the agreement was a sham or was a camouflage to bypass the Rent Control Ordinance or was an agreement to contract out of the said Ordinance and from asserting that he was a tenant of the premises.

*Cases referred to:-*

(1) *Isaac* v. *Hotel de Paris Ltd.* [1960] 1 All S.R. 348.

(2) *Pong Khee Kwei* v. *Tan Sai Kuy* [1972] 2 M.L.J. 48.

(3) *Booker* v. *Palmer* [1942] 2 All S.R. 674.

(4) *Sarah Chunder Dey & Ors.* v. *Gopal Chander Laka & Ors.* 19 I.A. 203.

CIVIL SUIT.

*V. K. Palasuntharam* for the plaintiff.

*Leong Tuck Onn* for the defendant.

**Mohamed Azmi J.:** By an agreement dated March 16, 1967, the plaintiff bought from one Tay Song Chay the whole piece of land held under Selangor Certificate of Title No. 9268, Lot 64 Section 20, in the town and district of Kuala Lumpur. On this land is a rent controlled building known as No. 29, Jalan Foch. At the time of purchase, the defendant was in occupation of the ground floor of the building (hereinafter referred to as "the premises") by virtue of an agreement dated September 9, 1965 entered into between him and Tay Song Chay. Under this 1965 agreement, it was agreed that the defendant should carry on the coffee shop business of Tay Song Chay at the premises for a period of sixty months, at the expiration of which the defendant undertook to deliver vacant possession of the premises. Since the property was sold to the plaintiff during the currency of the 1965 agreement, Tay Song Chay also assigned the said agreement to him. It is not in dispute that Tay Song Chay was holding at the time of the 1965 agreement a coffee shop licence to carry on the business of a coffee shop and had been carrying on such a business at the premises under the style of Lien Fatt Company for many years previously, and was the owner of all the furniture, chattels and effects as described in the schedule to the said agreement which were at all material times being used for the purpose of the coffee shop business. Under the said agreement, in consideration of the payment of $515 per month as "guaranteed net profit" by the defendant — who is referred to as the "contractor" — to Tay Song Chay — who is referred to as the "owner" — the defendant was allowed to carry on the said coffee shop business for a period of sixty months with effect from October 1, 1965. Pursuant to the said agreement, the defendant paid a deposit of $3,000 to Tay Song Chay and he also paid a sum of $12,000 as advanced payment, and the defendant should thereby be entitled to deduct a sum of $200 from the monthly guaranteed net profit of $515 payable by him to Tay Song Chay. The defendant should therefore be liable to pay only the balance of the guaranteed net profit amounting to $315 per mensem. The plaintiff became the registered owner of the property on March 29, 1967; and by letter dated April 14, 1967, the defendant was notified of the said sale and the assignment of the 1965 agreement. Pursuant to oral notices of the same given earlier on by Tay Song Chay and the plaintiff, the defendant started to pay the "guaranteed net profit" of $315 per month to the plaintiff instead of to Tay Song Chay with effect from April 1967, and this went on till September 1970. By letter dated July 11, 1970, the plaintiff through her solicitors notified the defendant that in accordance with clause 19 of the said agreement the sixty month period would expire at the end of September 1970 and he was therefore requested to deliver vacant possession of the premises on or before September 30, 1970, subject to terms and conditions of the agreement including the refund to the defendant of the deposit of $3,000 under clause 4. The defendant refused to comply with the said notice. Consequently, by a specially indorsed writ dated November 16, 1970, the plaintiff filed the present suit claiming vacant possession of the premises. The claim is, therefore, based essentially on the 1965 agreement.

The main issue in this case is whether by the 1965 agreement a legal relationship of landlord and tenant had been created between Tay Song Chay and the defendant, or whether their relationship was merely that of licensor and licensee, or principal and agent. If the agreement did not create a tenancy, it follows that there was no tenancy between the plaintiff and the defendant and, as such, the plaintiff should be entitled to possession of the premises at the expiry

of the agreement by effluxion of time. The defendant, however, contends that he is a tenant and is entitled to the protection of rent control legislation. He maintains that the 1965 agreement was a sham and was a mere camouflage to by-pass the Rent Control Ordinance, 1956 and was an agreement to contract out the said Ordinance. It is pleaded that the sum of $515 was "rental" for the premises and not a "guaranteed net profit" of the coffee shop business as alleged. The defendant contends that he is occupying the premises as a tenant under the name of Chop Din Hai Chua with three other partners with the full knowledge and consent of the plaintiff.

In determining the correct legal relationship between the parties on the basis of the 1965 agreement, learned counsel for the plaintiff has urged the court to adopt the subjective approach as approved by the Privy Council in *Isaac* v. *Hotel De Paris, Ltd.*,[1] and to disregard the objective approach approved by Sharma J. in the case of *Pong Khee Kwei* v. *Tan Sai Quy*.[2] In my view, whether the subjective or objective approach is to be applied, it is clear from the authorities that the decisive consideration in determining whether or not a person is a tenant under a particular agreement would depend on the intention of the parties. This must necessarily depend on the particular circumstances of each case. As stated by Lord Greene M.R. in *Booker* v. *Palmer*: [3]

"There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

Further, in *Isaac* v. *Hotel De Paris, Ltd., supra*, the following judgment of Archer J. was approved by Their Lordships of the Privy Council:

"It is clear from the authorities that the intention of the parties is the paramount consideration and while the fact of exclusive possession together with the payment of rent is of the first importance, the circumstances in which exclusive possession has been given and the character in which money paid as rent has been received are also matters to be considered. . . ."

In the present case, it is not necessary for me to set out in detail the various clauses in the 1965 agreement, but having considered the agreement as a whole, particularly clauses 1, 2 and 9, I am of the opinion that the relationship of Tay Song Chay and the defendant at all relevant times was not that of landlord and tenant but that of licensor and licensee or principal and agent. Under clause 2, it was agreed that the defendant should carry on the coffee shop business under the name of Lien Fatt Company, *i.e.* the name under which the coffee shop had always been known, and it was also stipulated that the defendant should not under any circumstances whatsoever change the name or the nature of the business. To my mind, this clause would not have been put in if the agreement was a mere camouflage to contract out of the Rent Control Ordinance. From the circumstances in which the premises have been given to the defendant and the character of the monthly payment made by him, including the advanced payment of $12,000 and the deposit of $3,000, I am satisfied that neither Tay Song Chay nor the plaintiff ever intended to accept the defendant as a tenant and that the defendant was fully aware of it. It is argued that when the sum of $315 was paid to the plaintiff from April 1967 as "guaranteed net profit", the plaintiff issued rent receipts for these payments. As such, it is submitted by the defence that by so doing the plaintiff intended to accept the defendant as a tenant. In my view, the use of the pre-printed rent receipts cannot by itself create a relationship of landlord and tenant. I accept the evidence of the plaintiff's son (PW1) that the pre-printed rent receipt book was used because it happened to be available and that there was never any intention to create a tenancy. It should be noted that Tay Song Chay, unlike the dentist in the case before Sharma J,. has many years of experience in running coffee shop business; and, as such, it is more probable that it was his intention to allow the defendant to carry on the said business under the terms of the contract. I think it is unreasonable to infer that it was his intention to let out the premises together with the furniture, chattels and effects therein to the defendant as a tenant in the absence of positive evidence. This is confirmed by the conduct of the defendant after he had been notified of the sale of the premises and the assignment of the agreement to the plaintiff in March 1967. If there was a relationship of landlord and tenant, it would have been natural for the defendant to inform the plaintiff of the true intention of the 1965 agreement. The defendant did not protest to the plaintiff or the solicitors, Messrs. Chung & Huang, when he received the written notice of assignment dated April 14, 1967 from the said solicitors acting on behalf of the plaintiff and Tay Song Chay. The plaintiff was an innocent purchaser for value and had no knowledge of the alleged tenancy until the refusal of the defendant to vacate the premises in September 1970. Thus, assuming that I am wrong in concluding that the 1965 agreement was not a sham and was not intended to create a tenancy, the omission on the part of the defendant after being notified of the sale and the assignment to disclose to the plaintiff that the said agreement was a sham and a cloak to by-pass the rent control legislation would estop him under section 115 of the Evidence Ordinance from presently making such allegations. Section 115 provides:

"When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and such person or his representative in interest to deny the truth of that thing."

In the case of *Sarat Chunder Dey & Ors.* v. *Gopal Chunder Laha & Ors.*,[4] Their Lordships of the Privy Council when dealing with the provision of section 115 of the Indian Evidence Act, which is similar to our section 115, held:

"It is quite unnecessary in order to create estoppel that the person whose acts or declarations, induced another to act must have been under no mistake himself, or must have acted with an intention to mislead or deceive. Estoppel mainly results from the fact that another has been induced, in reliance upon personal representations, acts or omissions, to act as he otherwise would not have acted."

In my judgment, the defendant is estopped from alleging that the 1965 agreement was a sham or was a

camouflage to by-pass the Rent Control Ordinance or was an agreement to contract out of the said Ordinance; from denying it to be true that it was pursuant to the 1965 agreement and to the assignment thereof to the plaintiff and to the said notices that as from about April 1967 to September 30, 1970 the defendant was in occupation of the premises and was using the said furniture, chattels and effects; and from asserting that the defendant was a tenant of Tay Song Chay or of the plaintiff.

In the present case, the circumstances and conduct of the parties show that all that was intended was that the defendant should have a personal privilege as a licensee or agent under the contract to run the coffee shop at the premises for a period of sixty months with no interest in the land at all. By effluxion of time, the plaintiff as registered owner of the property and as assignee of the 1965 agreement is, therefore, entitled to possession of the premises by September 30, 1970. After that date, the defendant occupies the premises at sufferance and is liable to be turned out whenever the plaintiff thought fit to execute her right to do so.

For reasons stated, I give judgment for the plaintiff in the following terms: —

(1) that the defendant do deliver vacant possession to the plaintiff of the ground floor of the building, No. 29, Jalan Foch, Kuala Lumpur, on or before December 1, 1972 subject to the terms and conditions of the agreement dated September 9, 1965 including the refund to the defendant of the deposit of $3,000;

(2) that the defendant do deliver to the plaintiff the furniture, chattels and effects as set out in the schedule to the said 1965 agreement;

(3) damages at $515 per month with effect from October 1, 1970 till delivery of vacant possession;

(4) costs.

*Order accordingly.*

Solicitors: *V. K. Palasuntharam; Kam Woon Wah & Co.*

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## AHMAD ISMAIL v. MALAYAN MOTOR COMPANY & ANOR.

**[A.C.J. (Mohamad Azmi J.) November 19, 1972]**

**[Kuala Lumpur — Civil Appeal No. 6 of 1972]**

*Hire-Purchase — Claim against car dealer — Relationship of car dealer and finance company — Implied condition that owner has right to sell the goods — Motor car detained by police and subsequently released — Whether breach of condition — Hire Purchase Act, 1969, 6(1)(b).*

*Sale of Goods (Malay States) Ordinance, 1957, s. 14(a).*

This was an appeal against the decision of the President, Sessions Court, dismissing the plaintiff's claim against the first defendant or in the alternative against the second defendant for the sum of $3,195 interest, general damages and costs. The first defendant was a second hand motor vehicle dealer and the second defendant was a finance company. The plaintiff bought a motor car and entered into a hire-purchase agreement with the second defendant, under which the second defendant was referred to as the owner and the plaintiff as the hirer. The car was subsequently detained by the police on suspicion that it was a stolen vehicle but it was subsequently released. The learned president dismissed the plaintiff's claim against the defendants. On appeal it was argued (1) that the learned president erred in law in holding that there was a sale of the car by the first defendant to the second defendant and that there was no contract of sale between the plaintiff and the car dealer; (2) even if there was a sale of the car by the car dealer to the finance company, the latter had committed a breach of the implied condition of the hire-purchase agreement.

**Held:** (1) the learned president was correct in holding that there had been a sale of the car from the first defendant to the second defendant and in dismissing the plaintiff's claim against the first defendant;

(2) in the circumstances there was indisputable evidence that the car was not in fact a stolen vehicle and as such there could be no question that the title could not pass to the plaintiff under section 6(1)(b) of the Hire Purchase Act or under section 14(a) of the Sale of Goods (Malay States) Ordinance, 1957 at the time when the property was to pass.

*Cases referred to:-*

(1) *Car and Universal Finance Co. Ltd.* v. *Caldwell* [1964] 1 All E.R. 290 at p. 297, C.A.

(2) *Farnworth Finance Facilities Ltd.* v. *Attryde and another* [1970] 2 All E.R. 774 at pp. 777 and 778.

(3) *Warman* v. *Southern Countries Car Finance Corporation Ltd.* [1949] 1 All E.R. 711 at pp. 712 and 713.

CIVIL APPEAL.

*Raja Abdul Aziz bin Raja Addruse* for the appellant.

*Miss R. Kandiah* for the first respondent.

*Chow Sing Yau* for the second respondent.

**Mohamed Azmi J.:** This is an appeal against the decision of the Senior President Sessions Court, Kuala Lumpur, given on December 18, 1971, in which he dismissed the plaintiff's claim against the first defendant or in the alternative against the second defendant for the sum of $3,195, interest, general damages and costs.

The facts of the case were as follows. The first defendant was a second-hand motor vehicle dealer whilst the second defendant was a finance company, both having their places of business at Jalan Pudu, Kuala Lumpur. On December 18, 1969 the plaintiff, an army staff sergeant, decided to buy a second-hand Morris car bearing registration No. BW 343 from the first defendant (hereinafter referred to as "the car dealer") at the price of $4,900. He paid the car dealer $2,200 comprising of a deposit of $1,000 in cash and $1,200 by way of trade-in of his old car. As for the balance of $2,700, it was agreed that it should be settled on or before December 19, 1969, in default of which the deposit of $1,000 would be forfeited. Since the plaintiff had no money to pay for the balance sum, he was introduced by the car dealer to the second defendant (hereinafter referred to as "the finance company"), as a result of which the plaintiff entered into a hire-purchase agreement with the said company on December 19, under which the finance company was referred to as the 'owners' of the Morris car and the plaintiff as the 'hirer'. In the hire-purchase agreement (Exhibit P3), the total amount payable by the plaintiff was stated to be $5,820, out of which $4,900 represented the price of the Morris car whilst the balance was